# Why Nevada?

## Legal Advantages: A Comparison with Delaware and California

*The summary below is a general guide to certain Nevada laws that apply to Nevada corporations as of August 15, 2012. The information contained in this guide is for general reference only and is not intended to provide legal advice. You should contact a Nevada attorney to advise you prior to conducting business in or incorporating in Nevada.*

A. <u>Nevada Provides Stronger Personal Liability Protection To Officers And Directors</u>

While statutes in Nevada, Delaware, and California have codified the business judgment rule as well as some of the general fiduciary duties owed to a corporation by its directors and officers, the directors and officers of Nevada corporations may enjoy a higher level of protection against personal liability due to Nevada's business-friendly corporate laws.

1. <u>Fiduciary Duty and Business Judgment</u>

Nevada, like most jurisdictions, requires that directors and officers of Nevada corporations exercise their powers in good faith and with a view to the interests of the corporation. NEV. REV. STAT. § 78.138(1). As a matter of law, directors and officers are presumed to act in good faith, on an informed basis, and with a view to the interests of the corporation in making business decisions. NEV. REV. STAT. § 78.138(3). In performing such duties, directors and officers may exercise their business judgment through reliance on information, opinions, reports, financial statements, and other financial data prepared or presented by corporate directors, officers, or employees who are reasonably believed to be reliable and competent. NEV. REV. STAT. § 78.138(2). Professional reliance may also be extended to legal counsel, public accountants, advisers, bankers, or other persons reasonably believed to be competent, and to the work of a committee (on which the particular director or officer does not serve) if the committee was established and empowered by the corporation's board of directors, and if the committee's work was within its designated authority and was about matters on which the committee was reasonably believed to merit confidence. NEV. REV. STAT. §§ 78.138(2), 78.125. However, directors and officers may not rely on such information, opinions, reports, books of account, or similar statements if they have knowledge concerning the matter in question that would make such reliance unwarranted. NEV. REV. STAT. § 78.138(2).

In Delaware and California, directors are similarly entitled to rely in good faith upon information, opinions, reports, and statements presented to the corporation by certain persons or committees identified by statute so long as specific criteria are met. DEL. CODE. ANN. tit. viii, § 141(e) (good faith doctrine in Delaware also applies to members of any committee designated by the board); CAL. CORP. CODE § 309. But unlike Nevada, Delaware and California do not extend the statutory protection for such good faith reliance to corporate officers. See NEV. REV. STAT. § 78.138(2); DEL. CODE. ANN. tit. viii, § 141(e); CAL. CORP. CODE § 309.

2. Director Immunity from Lawsuits

With certain exceptions, unless the corporation's articles provide for greater individual liability, directors and officers of a Nevada corporation will not be individually liable to the corporation, its stockholders or creditors for any damages as a result of any act or failure to act in their capacity as a director or officer unless it is proven that the act or failure to act breached fiduciary duties as a director or officer and such breach involved intentional misconduct, fraud, or a knowing violation of law. NEV. REV. STAT. § 78.138(7).

The Nevada statute provides exceptions to this general rule, including imposing liability in the following special circumstances: ouster (NEV. REV. STAT. § 35.230), securities violations (NEV. REV. STAT. § 90.660), commodities violations (NEV. REV. STAT. § 91.250), receiving deposits in insolvent banks with knowledge of insolvency (NEV. REV. STAT. § 668.045), and recovery by an insurer of profits realized from transactions made with unfair use of information (NEV. REV. STAT. § 694A.030).

Delaware and California provide a lower level of protection to corporate directors and officers than Nevada. Unlike Nevada, the Delaware and California statutes do not protect corporate officers, and require that limitations on a director's liability for monetary damages be included in the corporation's certificate (Delaware) or articles (California) of incorporation to be effective. DEL. CODE. ANN. tit. viii, § 102(b)(7); CAL. CORP. CODE § 204(a)(10). In addition, in Delaware and California there is no liability protection for directors with respect to the corporation's creditors.

Although Nevada generally requires both intentional misconduct, fraud or a knowing violation of the law and a breach of a fiduciary duty to impose liability on a director, under Delaware and California law, a director may be held liable for a breach of a fiduciary duty absent intentional misconduct, fraud or a knowing violation of the law. NEV. REV. STAT. § 78.138(7); DEL. CODE. ANN. tit. viii, § 102(b)(7); CAL. CORP. CODE § 204(a)(10).

B. Nevada Has Fewer Business Taxes

A further benefit of incorporating in Nevada is that some of the taxes and filing fees paid by a Nevada corporation are lower than the comparable taxes and fees paid by a Delaware or California corporation. The following is a list of tax benefits enjoyed by Nevada corporations:

- No Corporate Income Tax
- No Taxes on Corporate Shares
- No Franchise Tax
- No Personal Income Tax
- No Franchise Tax on Income
- No Inheritance or Gift Tax
- No Unitary Tax
- No Estate Tax
- Competitive Sales and Property Tax Rates
- Minimal Employer Payroll Tax–0.7% of gross wages with deductions for employer paid health insurance
- Nominal Annual Fees

In contrast, California imposes a corporate tax (8.84%), a minimum franchise tax of $800 per year (even if the corporation is not doing business in California), inheritance and gift tax, a unitary tax, an estate tax, and four different types of payroll tax.

C. <u>Nevada Has Business Courts</u>

Nevada has adopted Business Courts (based on the Delaware model) that minimize the time, cost, and risks of commercial litigation by (1) employing early, comprehensive case management, (2) allowing for active judicial participation in settlement, (3) giving priority to hearing settings to avoid business disruption, and (4) providing for predictability of legal decisions in commercial matters. Under local court rules of practice, management of Nevada's business court docket is the highest case management priority of the presiding judge of the business court docket. Civil actions are assigned to the business court docket if, regardless of the nature of relief sought, the primary subject matter of the action is a dispute concerning the validity, control, operation, or governance of business entities created under Nevada statute, a shareholder derivative action, a dispute concerning a trade-mark or trade name, a claim pursuant to the Nevada Trade Secrets Act, Nevada Securities Act, or Nevada Deceptive Trade Practices Act, a claim involving investment securities, or any other dispute among business entities that would benefit from the enhanced case management of the business court docket.

California does not have a business court.

D. <u>Nevada Grants Directors More Flexibility for Decisions (Including Takeovers)</u>

Nevada provides directors with more discretion than Delaware and California in making corporate decisions, including decisions made in takeover situations. In Nevada, director and officer actions taken in response to a change or potential change in control that do not disenfranchise stockholders are granted the benefits of the business judgment rule. NEV. REV. STAT. § 78.139(1). However, in the case of an action that impedes the rights of stockholders to vote for or remove directors, directors will only be given the advantages of the business judgment rule if the directors have reasonable grounds to believe a threat to corporate policy and


effectiveness exists and the action taken that impedes the exercise of the stockholders' rights is reasonable in relation to such threat. NEV. REV. STAT. § 78.139(2).

In Nevada, directors and officers who exercise their powers in response to a change or potential change of control may consider the effect of their decision on several corporate constituencies in addition to the stockholders, including the corporation's employees, the interests of the community, and the economy. NEV. REV. STAT. § 78.139(5). In contrast, Delaware and California do not provide a similar list of statutory factors that corporate directors and officers may consider in making decisions in response to a change or potential change of control. See generally DEL. CODE. ANN. tit. viii, § 141(e); CAL. CORP. CODE § 309.

Delaware, for example, provides that in many cases fiduciary duties require directors to accept an offer from the highest bidder regardless of the effect of such sale on the corporate constituencies other than the stockholders. See generally Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.3d 173 (Del. 1986). Thus, the flexibility granted to directors of Nevada corporations in the context of a hostile takeover are substantially greater than those granted to directors of Delaware corporations. As an example, if two potential buyers bid for a Delaware corporation and Buyer A offered $1 more than Buyer B but planned to shut down the operations of the corporation and fire all of its employees, the Delaware directors would likely be required to take the offer from Buyer A. If the same offers were made for a Nevada corporation, the Nevada directors would be able to consider the effect of Buyer A's plans on the employees of the corporation and the corporation's other constituencies as a basis for rejecting the offer from Buyer A.

E. <u>Comparison of Other Key Provisions of Nevada, Delaware, and California Law</u>

1. <u>Classified Board of Directors</u>

In Nevada, a corporation may classify its board of directors provided that at least one-fourth of the total number of directors is elected annually. NEV. REV. STAT. § 78.330(2).

Delaware law permits any Delaware corporation to classify its board of directors into as many as three classes with staggered terms of office. After initial implementation of a classified board, one class will be elected at each annual meeting of the stockholders to serve for a full term or until their successors are elected to take office. DEL. CODE. ANN. tit. viii, § 141(d).

California law is fairly complex with respect to classified boards. In California, only a listed corporation (defined as "a corporation with outstanding shares listed on the New York Stock Exchange, the NYSE

Amex, the NASDAQ Global Market, or the NASDAQ Capital Market") may, by amendment of its articles or bylaws, adopt provisions to permit a classified board. CAL. CORP. CODE. § 301.5(a). The board in such event may only be divided into two or three classes to serve for terms of two or three years respectively. CAL. CORP. CODE. § 301.5(a). If the board of directors is divided into two classes, there must be a minimum of six authorized directors, with one-half (or close approximation) elected at each annual meeting, and if the board is divided into three classes, the minimum number is nine, with one-third (or close approximation) elected at each annual meeting. CAL. CORP. CODE. § 301.5(b). If a listed corporation with a classified board ceases to be a listed corporation for any reason, the board of directors cease to be divided into classes as to each class of directors on the expiration of such director's term (unless the articles or bylaws provide for elimination of a classified board in such event at an earlier date or dates). CAL. CORP. CODE. § 301.5(e).

2. Quorum and Required Vote for Stock Corporations

In Nevada, generally, a majority of the stockholders with voting power (present in person or by proxy, whether or not the person holding the proxy has authority to vote on all matters), constitutes a quorum for the transaction of business. NEV. REV. STAT. § 78.320(1)(a). Any action (other than the election of directors) taken by stockholders is approved if the number of votes in favor of the action is greater than the number of votes against the action. NEV. REV. STAT. § 78.320(1)(b).

Directors are generally elected at the annual meeting of the stockholders by at least a plurality of the votes cast at the annual meeting unless a larger proportion is specified in the articles or bylaws. NEV. REV. STAT. § 78.330(1). The articles of incorporation may also provide that the voting power of an individual director or classes of directors may be greater or less than any other individual director or classes of directors. NEV. REV. STAT. § 78.330(3).

In Delaware, the certificate of incorporation or bylaws of any corporation authorized to issue stock may specify the number of shares having voting power and the number of such shares that must be present or represented by proxy at any meeting in order to constitute a quorum for the transaction of any business. DEL. CODE. ANN. tit. viii, § 216. A quorum may not consist of less than one-third of the shares entitled to vote at the meeting, except that, where a separate vote by a class or series or classes or series is required, a quorum consists of no less than one-third of the shares of such class or series. DEL. CODE. ANN. tit. viii, § 216. In the absence of such specification in the certificate of incorporation or bylaws of the corporation, a majority of the shares entitled to vote constitutes a quorum at a meeting of stockholders; in all matters other than the election of directors, the vote of the majority of shares present at the meeting and entitled to vote on the subject matter is required; and directors are elected by a plurality of the votes of the shares present at the meeting and entitled to vote on the election of directors. Additionally, a bylaw amendment adopted by stockholders that specifies the votes that shall be necessary for the election of directors shall not be further amended or repealed by the board of directors. DEL. CODE. ANN. tit. viii, § 216.

In California, unless otherwise provided in the articles, a quorum for a shareholders' meeting is a majority of the shares entitled to vote, represented in person or by proxy. CAL. CORP. CODE § 602(a). In no event can a quorum consist of less than one-third of the shares entitled to vote at the meeting, and with respect to a close corporation a quorum cannot be greater than a majority of the shares entitled to vote. CAL. CORP. CODE § 602(a). Once the quorum requirements are satisfied and the meeting is convened, if the withdrawal of shareholders from the meeting prior to adjournment reduces the number of remaining shareholders below the number otherwise required for a quorum, a majority of the minimum number of shares necessary to constitute a quorum must vote affirmatively to approve an action. CAL. CORP. CODE § 602(b).

3. Cumulative Voting

Cumulative voting for directors entitles stockholders to cast a number of votes that is equal to the number of voting shares held multiplied by the number of directors to be elected. Stockholders may cast all such votes either for one nominee or distribute such votes among up to as many candidates as there are positions to be filled. Cumulative voting may enable a minority stockholder or group of stockholders to elect at least one representative to the board of directors where such stockholders would not otherwise be able to elect any directors.

For Nevada corporations, cumulative voting in the election of directors is permitted only where provided for in the articles of incorporation and if certain notice procedures are followed. NEV. REV. STAT. § 78.360. Similarly, shareholders in a Delaware corporation may cumulate votes in the election of directors only if the corporation's certificate of incorporation so provides. DEL. CODE. ANN. tit. viii, § 214.

Unlike Nevada and Delaware, California statutes provide that shareholders may cumulate votes for the election of directors, unless the corporation is a listed corporation (defined as "a corporation with outstanding shares listed on the New York Stock Exchange, the NYSE Amex, the NASDAQ Global Market, or the NASDAQ Capital Market") and the listed corporation by amendment to its articles or bylaws eliminates cumulative voting rights. CAL. CORP. CODE. § 708. In California, any amendment to the articles or bylaws reducing the fixed number of directors or the minimum number of directors on a variable board size provision to a number less than five cannot be adopted if the votes cast against its adoption at a meeting, or the shares not consenting in the case of action by written consent, are equal to more than 16 .% of the outstanding shares of the corporation entitled to vote. CAL. CORP. CODE § 212(a).

4. Vacancies on the Board of Directors

Vacancies on the board of directors of a Nevada corporation may be filled by vote of a majority of the remaining directors, though less than a quorum, unless the articles of incorporation provide otherwise. NEV. REV. STAT. § 78.335(5).

Under Delaware law, vacancies on the board of directors are similarly filled by the affirmative vote of a majority of the remaining directors then in office, even if less than a quorum, unless otherwise provided in the certificate of incorporation or bylaws. DEL. CODE. ANN. tit. viii, § 223.

Under California law, for all vacancies on the board (except vacancies caused by removal), the remaining directors, even if less than a quorum, may by majority vote fill the vacancy, unless the articles or bylaws provide to the contrary. CAL. CORP. CODE. § 305(a). The requisite vote is a majority of all remaining directors rather than a majority of those present at a board meeting if the number of directors then in office is less than a quorum. CAL. CORP. CODE. § 305(a). Vacancies caused by removal of a director may only be filled by approval of the shareholders, unless the articles or bylaws provide otherwise. CAL. CORP. CODE. § 305 (a).

5. Removal of Directors

Under Nevada, Delaware, and California law, any director or the entire board of directors may be removed, with or without cause, upon the vote of the shares entitled to vote in the election of directors. See NEV. REV. STAT. § 78.335; DEL. CODE. ANN. tit. viii, § 141(k); CAL. CORP. CODE § 303.

For Nevada corporations, generally, any director may be removed by the vote of stockholders representing not less than two-thirds of the voting power of the issued and outstanding stock entitled to vote. NEV. REV. STAT. § 78.335(1). For corporations that elect directors with cumulative voting, any director or directors who constitute fewer than all of the directors may not be removed except upon the vote of stockholders owning sufficient shares to prevent each director's election to office at the time of removal. NEV. REV. STAT. § 78.335(2).

Under Delaware law, a majority vote is required to remove a director with or without cause, subject to two exceptions under which a director may be removed only for cause. DEL. CODE. ANN. tit. viii, § 141(k)(1-2).

California law permits removal of the directors by the affirmative vote of a majority of the outstanding shares entitled to vote so long as the entire board is being removed. CAL. CORP. CODE § 303(a). If less than all of the directors are to be removed, then no director may be removed if the votes cast against the removal of the director equal or exceed the number of votes needed to elect the director at an election of the entire board at which the same total number of votes was cast under cumulative voting. CAL. CORP. CODE § 303(a).

6. Indemnification of Officers and Directors and Advancement of Expenses

Nevada, Delaware, and California have substantially similar provisions regarding indemnification by a corporation of its officers, directors, employees, and agents. See NEV. REV. STAT. §§ 78.7502, 78.751, 78.752; DEL. CODE. ANN. tit. viii, § 145; CAL. CORP. CODE § 317.

Under Nevada law, the articles of incorporation, bylaws, or an agreement made by the corporation may provide that the corporation must pay advancements of expenses in advance of the final disposition of the action, suit, or proceedings upon receipt of an undertaking by or on behalf of the director or officer to repay the amount even if it is ultimately determined that he or she is not entitled to be indemnified by the corporation. NEV. REV. STAT. § 78.751(2). Thus, under such circumstances, a Nevada corporation may contractually provide for indemnification without the need for further approval.

Delaware law provides that expenses incurred by an officer or director in defending any civil, criminal, administrative or investigative action, suit or proceeding as the corporation deems appropriate may be paid by the corporation in advance of the final disposition of the action, suit or proceeding upon receipt of an undertak-

ing by or on behalf of the director or officer to repay the amount if it is ultimately determined that he or she is not entitled to be indemnified by the corporation. DEL. CODE. ANN. tit. viii, § 145(a)-(e). Thus, absent an agreement to the contrary, a Delaware corporation has the discretion to decide whether or not to advance expenses.

California law provides that expenses incurred by an agent of the corporation in defending any proceeding may be advanced by the corporation prior to the final disposition of the proceeding upon receipt of an undertaking by or on behalf of the agent to repay that amount if it shall be determined ultimately that the agent is not entitled to be indemnified as authorized by statute. CAL. CORP. CODE § 317. Thus, absent an agreement to the contrary, a California corporation likewise has the discretion to decide whether or not to advance expenses.

7. <u>Dividends</u>

Nevada law is more permissive than Delaware law insofar as when dividends may be paid. For Nevada corporations, except as otherwise provided in the corporation's articles of incorporation, no distribution (including dividends on, or redemption or repurchases of, shares of capital stock) may be made if, after giving effect to such distribution, the corporation would not be able to pay its debts as they become due in the usual course of business, or the corporation's total assets would be less than the sum of its total liabilities plus the amount that would be needed at the time of a liquidation to satisfy the preferential rights of preferred stockholders. NEV. REV. STAT. § 78.288.

Under Delaware law, subject to any restrictions provided in the certificate of incorporation, a corporation may declare dividends out of surplus or, if no surplus exists, out of net profits for the fiscal year in which the dividend is declared and/or the preceding fiscal year (provided that the amount of capital of the corporation following the declaration and payment of the dividend is not less than the aggregate amount of the capital represented by the issued and outstanding stock of all classes having a preference upon the distribution of assets). DEL. CODE. ANN. tit. viii, § 170.

Under California law, neither a corporation nor any of its subsidiaries are permitted to make any distribution to the corporation's shareholders unless the board of directors has determined in good faith that either (1) the amount of retained earnings of the corporation immediately prior to the distribution equals or exceeds the sum of the amount of the proposed distribution plus the preferential dividends arrears amount, or (2) immediately after the distribution, the value of the corporation's assets would equal or exceed the sum of its total liabilities plus the preferential rights amount. CAL. CORP. CODE. § 500.

8. Restrictions on Business Combinations

Both Nevada and Delaware law contain provisions restricting the ability of a corporation to engage in business combinations with an interested stockholder.

In Nevada, the business combination statutes prohibit certain “combinations” between a Nevada corporation and an “interested stockholder” for three years after such a person becomes an interested stockholder. See NEV. REV. STAT. §§ 78.411 - 78.444. An interested stockholder is anyone who is the beneficial owner of 10 percent or more of the voting power of the outstanding voting shares of the corporation or an affiliate or associate of the corporation and at any time within 3 years immediately before the date in question was the beneficial owner of 10 percent or more of the then outstanding shares of the corporation. NEV. REV. STAT. § 78.423. The three-year moratorium can be lifted only by advance approval by a corporation’s board of directors. NEV. REV. STAT. § 78.438. Further, after the three-year period, combinations remain prohibited unless (1) they are approved by the board of directors before the date that the person first became an interested stockholder or a majority of the outstanding voting power not beneficially owned by the interested party, or (2) the interested stockholder satisfies certain fair-value requirements. NEV. REV. STAT. §§ 78.439, 78.441. A Nevada corporation may opt out of the statute with appropriate provisions in its articles of incorporation; however, the opt-out would apply only prospectively. NEV. REV. STAT. § 78.434.

Under Delaware law, a corporation is not permitted to engage in a business combination with any interested stockholder for a three-year period following the date such stockholder became an interested stockholder, unless (i) the transaction resulting in a person becoming an interested stockholder, or the business combination, is approved by the board of directors of the corporation before the person becomes an interested stockholder; (ii) upon consummation of the transaction that resulted in the stockholder becoming an interested stockholder, the interested stockholder owned at least 85% of the outstanding voting stock of the corporation outstanding at the time the transaction commenced (excluding shares owned by persons who are both officers and directors of the corporation, and shares held by certain employee stock ownership plans); or (iii) at or after the date the person becomes an interested stockholder, the business combination is approved by the corporation’s board of directors and by the holders of at least two thirds of the corporation’s outstanding voting stock at an annual or special meeting and not by written consent, excluding shares owned by the interested stockholder. DEL. CODE. ANN. tit. viii, § 203(a). Delaware law defines “interested stockholder” generally as a person who owns 15% or more of the outstanding shares of a corporation’s voting stock. DEL. CODE. ANN. tit. viii, § 203(c)(5). Like Nevada, Delaware allows corporations to “opt out” of the business combinations statutes. DEL. CODE. ANN. tit. viii, § 203(b)(1-3).

9. Amendment to Articles / Certificate of Incorporation

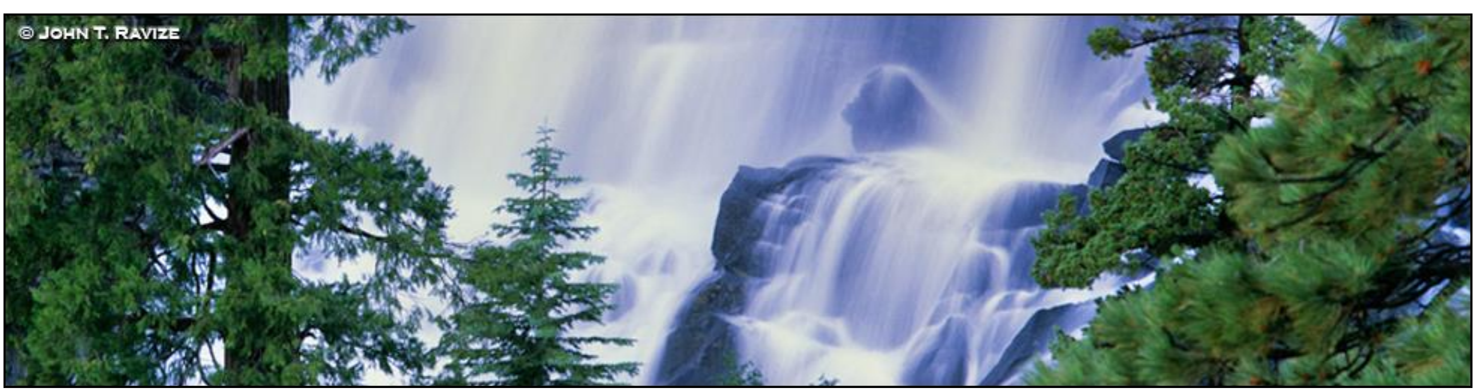
Nevada, Delaware, and California law provide that, after receipt of payment for stock, or for non-stock corporations, approval of proposed amendments to a corporation's articles (in Nevada and California) or certificate (in Delaware) of incorporation requires the affirmative vote of holders of a majority of all outstanding shares entitled to vote, with each such stockholder being entitled to one vote for each share held. See NEV. REV. STAT. § 78.390(1)(b); DEL. CODE. ANN. tit. viii, § 242(b)(1); CAL. CORP. CODE § 902.

In Nevada and Delaware, holders of the outstanding shares of a particular class are entitled to vote as a class on a proposed amendment if the amendment would alter or change the power, preferences, or special rights of one or more series of any class so as to affect them adversely. NEV. REV. STAT. § 78.390; DEL. CODE. ANN. tit. viii, § 242(a)(3)-(5). Under Nevada law, but not under Delaware law, an amendment that would adversely alter or change any preference or other right given to any class or series of outstanding shares does not have to be approved by the vote of the holders of shares representing a majority of the voting power of each class or series whose preference or rights are adversely affected by the amendment if the articles of incorporation specifically deny the right to vote on such an amendment. NEV. REV. STAT. § 78.390(2).

California law differs from Nevada and Delaware in that holders of outstanding shares of a class or series are entitled to vote as a class or series upon a proposed amendment, whether or not entitled to vote by the articles, if the amendment would: (1) Increase or decrease the aggregate number of authorized shares of that class or series; (2) Effect an exchange, reclassification or cancellation of all or part of the shares of that class or series; (3) Effect an exchange, or create a right of exchange, of all or any part of the shares of another class or series for shares of that class or series; (4) Change the rights, preferences, privileges or restrictions of the shares of that class or series; (5) Create a new class or series of shares having rights, preferences or privileges prior to the shares of that class or series, or increase the rights, preferences or privileges or the number of authorized shares of a class or series having rights, preferences or privileges prior to the shares of the class or series; (6) In the case of preferred shares, divide the shares of that class into series having different rights, preferences, privileges or restrictions, or authorize the board to do so; or (7) Cancel or otherwise affect distributions on the shares of the class or series that have accrued but have not been paid. CAL. CORP. CODE § 903(a).

10. Actions by Written Consent of Stockholders

Nevada, Delaware, and California statutes provide that, unless the articles (in Nevada and California) or certificate (in Delaware) of incorporation or the bylaws (in Nevada) provide otherwise, any action required or permitted to be taken at a meeting of the stockholders may be taken without a meeting if the holders of out-



standing stock having at least the minimum number of votes that would be necessary to authorize or take such action at a meeting consents to the action in writing. NEV. REV. STAT. § 78.320; DEL. CODE. ANN. tit. viii, § 228(a); CAL. CORP. CODE § 603. In addition, Delaware and California law requires the corporation to give prompt notice of the taking of corporate action without a meeting by less than unanimous written consent to those stockholders who did not consent in writing. DEL. CODE. ANN. tit. viii, § 228(e); CAL. CORP. CODE § 603.

11. Stockholder Vote for Mergers and Other Corporate Reorganizations

In general, Nevada and Delaware provide that the merger of a corporation requires the approval of a majority of outstanding shares entitled to vote as well as approval of the board of directors. See NEV. REV. STAT. § 92A.120; Del Code Ann. tit. viii, § 251. Both jurisdictions generally provide that the surviving corporation in a merger does not need to obtain stockholder approval if the articles or certificate, as applicable, of incorporation do not change as a result of the merger, each stockholder of the surviving corporation will hold the same number of shares after the merger, and the surviving corporation issues no more than 20% of its voting stock in connection with the merger. NEV. REV. STAT. § 92A.130; Del Code Ann. tit. viii, § 251(f). Nevada also requires that the shares of each stockholder in the surviving corporation have the same relative rights, preferences, limitations, and designations after the merger as they did prior to the merger. NEV. REV. STAT. § 92A.130(1)(b).

In California, a merger or other reorganization must be approved by the majority of the outstanding shares of each class of each corporation where approval of the board is likewise required. CAL. CORP. CODE §§ 1201(a), 152. However, unless otherwise provided in the articles, no approval of outstanding preferred shares of a surviving corporation or acquiring corporation is required if the rights, preferences, privileges and restrictions granted to or imposed upon the shares remain unchanged. CAL. CORP. CODE § 1201(a). Also, no approval of the outstanding shares is required in the case of a corporation that issues a de minimis amount of shares in the reorganization—which occurs when the corporation or its shareholders immediately before the reorganization shall also own immediately after the reorganization equity securities of the surviving or acquiring corporation or a parent party possessing more than five-sixths of the voting power of the surviving or acquiring corporation or parent party. CAL. CORP. CODE § 1201(b).

In California, even if the share dilution is less than the threshold described above, shareholder approval is still required if an amendment is made to the articles in the reorganization which would require approval of the outstanding shares, CAL. CORP. CODE § 1201(c), holders of preferred shares receive shares with different rights, preferences, privileges or restrictions than those surrendered, CAL. CORP. CODE § 1201(d), holders of shares receive interests in a business entity other than a corporation, CAL. CORP. CODE § 1201(f), or holders of shares as a result of the reorganization are to become personally liable for any obligation of a party to the reorganization (unless all of the shareholders have dissenters' rights). CAL. CORP. CODE § 1201(g) In addition, if the holders were shareholders in a close corporation and in the reorganization they will receive shares in a corporation which is not a close corporation, the reorganization must be approved by at least two-thirds of each class of outstanding shares of the close corporation. CAL. CORP. CODE § 1201(e).

Nevada, Delaware, and California law provides that a sale of all of a corporation's assets requires board approval and the approval of a majority of outstanding shares entitled to vote. See NEV. REV. STAT. § 78.565; Del Code Ann. Tit. viii, § 271; CAL. CORP. CODE § 1001. Unlike Nevada, both Delaware and Cali-

fornia require the same majority stockholder approval for a sale of substantially all of a corporation's assets. Although it is unlikely that a Nevada court would interpret NEV. REV. STAT. § 78.565 literally to permit an unapproved sale of all but a token amount of assets, it is likely that many sales that would require stockholder approval under Delaware and California law would not require such approval under Nevada law.

12. Dissenters' Rights

In Nevada, Delaware, and California, dissenting stockholders of a corporation engaged in certain major corporate transactions are entitled to appraisal rights. See NEV. REV. STAT. §§ 78.3793, 92A.300 – 92A.500 inclusive; DEL. CODE. ANN. tit. viii, § 262; CAL. CORP. CODE § 1300. Appraisal rights permit a stockholder to receive cash equal to the fair market value of the stockholder's shares (as determined by agreement of the parties or by a court) in lieu of the consideration such stockholder would otherwise receive in any such transaction.

Under Nevada law, a stockholder is entitled to dissent from, and obtain payment for the fair value of his or her shares in the event of (i) certain acquisitions of a controlling interest in the corporation, (ii) consummation of a plan of merger, if approval by the stockholders is required and the stockholder is entitled to vote on the merger or if the domestic corporation is a subsidiary and is merged with its parent, (iii) a plan of exchange in which the corporation is a party, or (iv) any corporate action taken pursuant to a vote of the stockholders, if the articles of incorporation, bylaws or a resolution of the board of directors provides that voting or nonvoting stockholders are entitled to dissent and obtain payment for their shares. See NEV. REV. STAT. §§ 78.3793, 92A.300 – 92A.500 inclusive.

Holders of securities listed on a national securities exchange or designated as a national market system security on an interdealer quotation system by the National Association of Securities Dealers, Inc. (the "NASD") or held by at least 2,000 stockholders of record are generally not entitled to dissenters' rights. NEV. REV. STAT. §§ 78.3793, 92A.390. This exception is not, however, available if the articles of incorporation of the corporation issuing the shares state that it is not available, or if the holders of the class or series are required under the plan of merger or exchange to accept for the shares anything except cash, shares of stock as described in NEV. REV. STAT. § 92A.390(b), or a combination thereof. Nevada law prohibits a dissenting shareholder from voting his shares or receiving certain dividends or distributions after his dissent. See NEV. REV. STAT. § 92A.380.

Under Delaware law, appraisal rights are generally available for the shares of any class or series of stock of a Delaware corporation in a merger or consolidation, provided that no appraisal rights are available for the shares of any class or series of stock that, at the record date for the meeting held to approve such transaction, were either (1) listed on a national securities exchange or designated as a national market system security on an interdealer quotation system by the NASD or (2) held of record by more than 2,000 stockholders. DEL. CODE. ANN. tit. viii, § 262(b)(1). Even if the shares of any class or series of stock meet the requirements of subsections (1) or (2) above, appraisal rights are available for such class or series if the holders thereof receive in the merger or consolidation anything except cash, shares of stock as described in DEL. CODE. ANN. tit. viii, § 262(b)(2), or a combination thereof.

Recent amendments to Delaware stockholders' appraisal rights allow beneficial owners of shares to file a petition for appraisal without the need to name a nominee as a nominal plaintiff and to make it easier to withdraw from the appraisal process and accept the terms offered in the merger or consolidation. See DEL. CODE. ANN. tit. viii, § 262(e) and (k). No appraisal rights are available to stockholders of the surviving corporation if the merger did not require their approval. DEL. CODE. ANN. tit. viii, § 262(b)(1).

In California, dissenters' rights are generally available to shareholders of a California corporation which is involved in a conversion, a merger, or a sale-of-assets reorganization. The determining factor, subject to certain exceptions, is whether the approval of the outstanding shares of the corporation was required for the reorganization. CAL. CORP. CODE § 1300(a). If approval of the outstanding shares of that class was required, those shareholders are eligible for dissenters' rights. CAL. CORP. CODE § 1300(a).

13. Stockholder Inspection Rights

Nevada provides greater privacy for corporate records than Delaware and California. Under Nevada law, only a stockholder of record who owns at least 15% of the corporation's outstanding shares, or has been authorized in writing by holders of at least 15% of the outstanding shares, is entitled to inspect and make copies of the corporation's financial records. NEV. REV. STAT. § 78.257(1). Only a person who has been a stockholder of record for at least six months, or who owns at least 5% of the corporation's outstanding shares or has been authorized in writing by holders of at least 5% of the outstanding shares, is entitled to inspect and make copies of the corporation's stock ledger, articles of incorporation, and bylaws. NEV. REV. STAT. § 78.105(3). All costs for making copies of records or conducting an audit must be borne by the stockholder(s) exercising the right to inspect. NEV. REV. STAT. § 78.257(2). The right to inspect may be denied to any stockholder(s) who refuses to furnish the corporation an affidavit that the inspection, copies, or audit is not desired for any purpose not related to his or her interest in the corporation as a stockholder. NEV. REV. STAT. § 78.257(3). Any stockholder who uses or attempts to use information, records or other data obtained from the corporation for any purpose not related to the stockholder's interest in the corporation as a stockholder is guilty of a gross misdemeanor. NEV. REV. STAT. § 78.257(4).

Delaware law generally grants any stockholder of record the right to inspect and to copy for any proper purpose the corporation's stock ledger, a list of its stockholders, and its other records. A proper purpose is one reasonably related to such person's interest as a stockholder. DEL. CODE. ANN. tit. viii, § 220(b). Directors also have the right to examine the corporation's stock ledger, a list of its stockholders and its other records for a purpose reasonably related to their positions as directors. DEL. CODE. ANN. tit. viii, § 220(d).

In California, a shareholder or shareholders holding at least 5% in the aggregate of the outstanding voting shares or who hold at least 1% of a corporation which has filed a Schedule 14A under the Securities Exchange Act of 1934 has an absolute right to: (1) inspect and copy upon written demand the record of shareholders during usual business hours upon five business days prior written demand; or (2) obtain from the transfer agent upon written demand and payment of usual charges a list of the shareholders who are entitled to vote for the election of directors. CAL. CORP. CODE § 1600(a). Shareholder records are also open to inspection and copying by any other shareholder or holder of a voting trust certificate at any time during usual business hours upon written demand of the corporation for a purpose reasonably related to such holder's interest. CAL. CORP. CODE § 1600(c). The accounting books and records and minutes of proceedings of the shareholders and the board and committees of the board are also open to inspection by any shareholder or holder of a voting trust certificate at any reasonable time during usual business hours for a purpose reasonably related to such holder's interest. CAL. CORP. CODE § 1601(a).

14. <u>Derivative Suits</u>

Under Nevada, Delaware, and California law, a stockholder may bring a derivative action on behalf of the corporation only if the stockholder was a stockholder of the corporation at the time of the transaction in question or the stockholder acquired the stock thereafter by operation of law. Nev. R. Civ. P. 23.1; DEL. CODE. ANN. tit. viii, § 327; CAL. CORP. CODE § 800.

15. <u>Special Meetings of Stockholders</u>

Nevada law permits the entire board of directors, any two directors, or the president to call special meetings of the stockholders, unless the articles of incorporation or bylaws provide otherwise. NEV. REV. STAT. § 78.310(2). Delaware law permits special meetings of stockholders to be called by the board of directors or by any other one or more persons authorized in the certificate of incorporation or bylaws to call a special stockholder meeting. DEL. CODE. ANN. tit. viii, § 211(d). In California, a special meeting of stockholders may be called by the board, the chairman of the board, the president, or any other person authorized in the articles or bylaws. CAL. CORP. CODE § 600(d). California is different from Nevada and Delaware, however, in that a special meeting of stockholders must be called if properly demanded by a shareholder or group of shareholders holding shares entitled to cast not less than 10% of the votes at the meeting, regardless whether such right is provided in the articles or bylaws of the corporation. CAL. CORP. CODE § 600(d).

16. <u>Renunciation of Specific Business Opportunities</u>

Nevada and Delaware laws provide that a corporation may renounce specified business opportunities in its articles (Nevada) or certificate (Delaware), or in an action or resolution of the board. NEV. REV. STAT. § 78.070; DEL. CODE. ANN. tit. viii, § 122(17). These provisions allow a safe harbor to directors and officers to pursue the renounced businesses where an opportunity to profit therefrom has been presented to the corpora-


tion or to one or more of its directors, officers, or stockholders. California statutes do not grant corporations express authority to renounce in its articles of incorporation or by action by the board of directors any interest or expectancy to participate in specified business opportunities.

17. Other Nevada Laws

Further benefits to businesses electing to incorporate in Nevada include that a Nevada corporation may purchase, hold, sell, or transfer shares of its own stock, and issue stock for capital, services, personal property, or real estate, including leases and options. NEV. REV. STAT. §§ 78.070(3), 78.211(1). Moreover, the directors may determine the value of any of these transactions, and their decision is final in the absence of actual fraud in the transaction. NEV. REV. STAT. § 78.211(1). Finally, Nevada provides more privacy for its corporate business owners.

While non-publicly traded corporations must provide the Secretary of State with an up-to-date list of owners of record or a statement indicating where such a list is maintained, the information provided must be kept confidential. NEV. REV. STAT. § 78.152. Nevertheless, in connection with a law enforcement agency's request in the course of a criminal investigation, the Secretary of State may require a corporation to submit a copy of the list of owners or owner answer interrogatories related to the investigation. NEV. REV. STAT. § 78.152.

18. Other California Laws

The California Corporations Code contains a number of unique and potentially restrictive provisions, including the following: (a) CAL. CORP. CODE § 35000-35007 requires that "subversive organizations" register as such with the California Secretary of State; (b) CAL. CORP. CODE § 2201 imposes personal penalties for corporate officers who fail to note upon the books of the corporation the issuance or transfer of uncertificated shares; (c) CAL. CORP. CODE § 2207 provides for civil penalties on corporations for issuing materially false statements in corporate reports and other corporate documents; (d) CAL. CORP. CODE § 2251 imposes misdemeanor criminal penalties on a promoter, director, or officer of a corporation who improperly issues uncertificated securities; (e) CAL. CORP. CODE § 2254 imposes felony criminal penalties on a director, officer, or agent of a corporation who knowingly concurs in issuing a false statement in a corporate document; and (f) CAL. CORP. CODE §§ 2255-56 provides for potential imprisonment for directors, officers, and agents who take possession of corporate property and alter the books or accounts of the corporation with intent to defraud by a corporate officer.